ordinance was passed. The defendant refused to pay his assessment. *Held*, that he is not liable. *City of Lexington* v. *Walley*, 109 S. W. 299 (Ky.).

A substantial variance from a contract for city improvements will invalidate an assessment therefor. *Scranton Sewer*, 213 Pa. 4. The improvement is then regarded as if made without the authorizing ordinance required by statute as a public safeguard. *City of Excelsior Springs* v. *Ettenson*, 96 S. W. 701 (Mo.). It is usually no defense that the work was not done strictly according to specifications, where the proper authorities have accepted it, but this rule does not apply so as to permit a city to accept an improvement essentially different from the one contracted for. *Gage* v. *People*, 193 Ill. 316. Nor could a subsequent ordinance ratify the work so as to validate the assessment; otherwise that which had to be done by ordinance could in effect be accomplished without that formality. *Hubbell* v. *Bennett*, 130 Ia. 66. But to require literal compliance in every respect where there has been an honest endeavor to perform the contract would allow the assessment to be avoided on technical grounds. See *Lindsey* v. *Brawner*, 97 S. W. 1 (Ky.). Such a course is as open to objection as permitting the city to accept a totally different improvement. Whether in the case considered there was a substantial variance is doubtful. *Cf. City of Lowell* v. *Hadley*, 49 Mass. 180.

NUISANCE — EQUITABLE RELIEF — BILL AGAINST PUBLIC NUISANCE BY INDIVIDUAL. — The defendant, a riparian owner on New York Bay, erected a pier. The complainant, although he showed no special damage, prayed that the defendant be enjoined from obstructing the public right of way between high and low water mark. *Held*, that the complainant is not entitled to an injunction. *Barnes* v. *Midland Railroad Terminal Co.*, 126 N. Y. App. Div. 435. See NOTES, p. 137.

PRESCRIPTION — ACQUISITION OF RIGHTS — PRESCRIPTIVE DAMAGE. — The plaintiffs sought to enjoin the defendant from causing sewage to pass over their oyster beds, alleging as damage that the sale of their oysters had been recently prohibited. The defendant relied on a prescriptive right, proving that sewage had been so passed during the statutory period. *Held*, that the injunction should be granted. *Owen* v. *Faversham Corporation*, 72 J. P. 404 (Eng., Ch. D., June 23, 1908).

In general a natural right is not invaded unless some actual damage is suffered. *Sturges* v. *Bridgman*, 11 Ch. D. 852. An exception is made in the case of water rights, in which any sensible diminution gives a right of action. *Roberts* v. *Gwyrfai District Council*, [1899] 1 Ch. 583. A prescriptive right to commit a nuisance has been acquired when no actual damage was suffered during the statutory period. *Dana* v. *Valentine*, 5 Met. (Mass.) 8. The prerequisite right of action involved in this doctrine is based on either of the fallacious views, that an action must be given to prevent the acquisition of a prescriptive right, or that damage, though not yet actual, may be assumed to exist because of a possible prospective alteration in the use of the property. See *Farly* v. *Gate City Gaslight Co.*, 105 Ga. 323; *Ruckman* v. *Green*, 9 Hun (N. Y.) 225. The general adoption of this rule would entail a constant watchfulness by landowners for possible future damage and much accompanying litigation. And in the absence of such caution prescriptive rights would so multiply as to impair seriously the development of property. This rule, not at all established in this country, the English courts wisely refuse to follow.

PROPERTY — LANDLORD AND TENANT — SURRENDER BY DELIVERY OF KEYS. — A landlord accepted the keys from a tenant who left before the end of his term, but specified that it was only for the purpose of re-letting for the tenant's benefit. He advertised at an increased rental and contracted for extensive alterations to be made at once. He later sued for the rent due after the tenant had vacated. *Held*, that the tenant is not liable. *In re Schomacker Pianoforte Mfg. Co.*, 163 Fed. 413 (Dist. Ct., E. D. Pa.).

A mere delivery of the keys by the tenant to the landlord does not work a surrender of the term. *Newton* v. *Speare Co.*, 19 R. I. 546. But it is settled that

a delivery of the keys and an unqualified acceptance by the landlord do amount to a surrender. *Dodd* v. *Acklom*, 6 M. & G. 672. The general rule is that if the landlord's acts are inconsistent with the existence of the particular estate he is deemed to have accepted the tenant's offer to surrender. See 22 HARV. L. REV. 55. Thus where a landlord lets the vacated premises to a third person without the tenant's assent there is a surrender by operation of law. *Gray* v. *Kaufman Co.*, 162 N. Y. 388. And when he enters and makes alterations, the term is surrendered. *McKellar* v. *Sigler*, 47 How. Pr. (N. Y.) 20. In the principal case the landlord's intention in fact was not to rent the premises for the tenant's benefit, but, by making alterations during the continuance of the term, so to improve the house that it would command a higher rental in the future. Such a position is inconsistent with the relation of landlord and tenant and ends the tenant's liability for rent. *Duffy* v. *Day*, 42 Mo. App. 638.

WAGERING CONTRACTS — RENEWED PROMISE TO PAY FOR NEW CONSIDERATION. — The defendant gave the plaintiff a check on a gambling debt. After part payment, the defendant promised to pay the balance, if the plaintiff would hold over the check and not publish him as a defaulter. *Held*, that the plaintiff can recover on the new contract. *Hyams* v. *Stuart King*, [1908] 2 K. B. 696.

Not publishing the defendant as a defaulter is new and sufficient consideration. See 8 HARV. L. REV. 27; 12 *ibid.* 515. But an obligation arising out of an illegal transaction, even though for new consideration, will not be enforced between the same parties, if the plaintiff requires the aid of the original transaction to make out his case. See *Gray* v. *Hook*, 4 Comst. (N. Y.) 449. Accordingly, in America, where a wagering contract is regarded as both void and illegal, an agreement to settle it for new consideration on a new basis is invalid. *Everingham* v. *Meighan*, 55 Wis. 354. The principal case ought to be similarly decided, if the original transaction were clearly illegal. See *Simpson* v. *Bloss*, 7 Taunt. 246. But wagering contracts were valid at common law. The English statute makes them void, but not illegal. *Fitch* v. *Jones*, 5 E. & B. 238. Hence there is no taint of illegality to carry over to the new contract, even though it arises out of the original void transaction. Upon the assumption that the first transaction is merely void, the case is rightly decided, and follows previous English decisions. *Bubb* v. *Yelverton*, L. R. 9 Eq. 471; *In re Browne*, [1904] 2 K. B. 133.

WASTE — PERMISSIVE WASTE — WHETHER TENANT FOR YEARS LIABLE FOR TREBLE DAMAGES. — A tenant for years was guilty of permissive waste. *Held*, that he is not liable for treble damages. *Rimoldi* v. *Hudson Guild*, 59 N. Y. Misc. 480.

At common law an action of waste only lay against tenants in by act of law. 2 Co. Inst. 299. To protect the inheritance against the waste of tenants in by act of the parties, the Statute of Marlbridge was passed in 1267 providing that termors should not "do or make waste." 52 Hen. III, c. 23. That proving inadequate, the Statute of Gloucester in 1278 enacted that one guilty of waste should forfeit his term and pay treble damages. 6 Ed. I, c. 5. These ancient statutes are a part of the common law of this country. *Sackett* v. *Sackett*, 8 Pick. (Mass.) 309. In many states they have been re-enacted. See N. Y. Code Civ. Proc. § 1655. Prior to these statutes waste was recognized in the law as an injury to the inheritance resulting from acts of either commission or omission. See *Moore* v. *Townshend*, 33 N. J. L. 284. The statutes did not create new kinds of waste, but gave a new remedy for the old wastes. See 2 Co. Inst. 145. Consequently it has been held that to "do or make waste" includes permissive as well as voluntary waste. *Robinson* v. *Wheeler*, 25 N. Y. 252. And by the weight of authority a tenant for years is liable in full damages for permissive waste. *Newbold* v. *Brown*, 44 N. J. L. 266. It is, therefore, difficult to support the principal case. See *Coke* v. *The Champlain Transportation Co.*, 1 Den. (N. Y.) 91.